A **LIM KIEN SENG & ANOR v. MANOHARAN KANDASAMY**

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
MOHD ZAWAWI SALLEH FCJ
IDRUS HARUN FCJ
B ABDUL RAHMAN SEBLI FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-44-04-2019(W)]
18 DECEMBER 2020

C ***LEGAL PROFESSION:*** *Bill of costs – Taxation – Claim for payment of legal fees and order for taxation – Whether requirements of delivering bill of costs fulfilled – Failure to deliver bill of costs – Whether letter between solicitor and appellant constituted consent – Whether appellant merely asked whether solicitor open to having bills taxed in letter – Whether more than six years lapsed since completion*
D *of work – Whether entitlement of solicitor affected – Legal Profession Act 1976, s. 126*

The respondent was appointed by Patent View Development Sdn Bhd ('Patent View') and the appellants in their personal capacities to act for them in various legal proceedings. Subsequently, the appellants terminated the
E services of the respondent. The appellants' solicitors, Messrs Culaz & Associates ('Messrs Culaz') informed the respondent that they had instructions to represent Patent View and the appellants, and requested, *inter alia*, for a list of pending matters, final account of fees paid and the balance payable. The respondent stated his objection to any matter that was
F on record being handled by him or any other solicitor until the fees due and owed to him was settled in full. On 16 March 2012, the respondent delivered *pro forma* invoices amounting to RM4,911,553 to Patent View and the appellants. On 2 April 2012, the appellants disputed both the principal and quantum charged and inquired whether the respondent consented to the
G taxation of the bills under s. 126(3) of the Legal Profession Act 1976 ('LPA'). On 22 September 2016, the respondent prepared a detailed bill of costs for taxation and effected service on the appellants. On 21 November 2016, the respondent filed an originating summons, which was later amended, *inter alia*, for payment of the legal fees and order for taxation. On
H 19 June 2017, the High Court allowed the amended originating summons. On 30 May 2018, the Court of Appeal dismissed the appellant's appeal against the High Court order. Hence, this appeal by the appellants

Held (allowing appeal)
Per Abdul Rahman Sebli FCJ delivering the judgment of the court:

I **(1)** The central issue that arose was whether the letter dated 2 April 2012 amounted to a consent by the appellants. The letter dated 2 April 2012, when properly construed, did not constitute consent as the appellants

had merely asked whether the respondent was open to having the bills taxed *ie*, whether the other party consented to taxation pursuant to s. 126(3) of the LPA. The question of consent did not arise. The respondent did not reply. He had only filed the originating summons five years later. (paras 3 & 24)

(2) The respondent had not fulfilled the requirement of delivering a bill of costs and as such was not entitled to seek an order of taxation. On that basis alone, the amended originating summons ought to have been dismissed. The *pro forma* invoices were not bills of costs within the meaning of s. 126(1) of the LPA. No bills of costs were ever delivered to the appellants. The respondent did not provide any reason for his failure to do so. Given that more than six years had lapsed since the completion of the work, the respondent would no longer be entitled to take any of the foregoing steps. (para 22)

(3) Even if the respondent could be taken to have delivered bills of costs within the meaning of s. 126(1) of the LPA, he was not entitled to seek an order of taxation after one year from the date of delivery of the bills. The purported bills were delivered on 16 March 2012 and the one year period lapsed on 16 March 2013. The originating summons was filed on 21 November 2016. (para 23)

Bahasa Melayu *Headnotes*

Responden telah dilantik oleh Patent View Development Sdn Bhd ('Patent View') dan perayu-perayu dalam kapasiti peribadi mereka untuk bertindak untuk pihak-pihak tersebut dalam pelbagai prosiding undang-undang. Seterusnya, perayu-perayu menamatkan perkhidmatan responden. Peguam cara perayu-perayu, Messrs Culaz & Associates ('Messrs Culaz') memaklumkan responden bahawa mereka diarahkan mewakili Patent View dan perayu-perayu, dan meminta, antara lain, senarai perkara-perkara yang belum selesai, akaun akhir yuran yang dibayar serta baki yang belum dibayar. Responden menyatakan bantahannya terhadap mana-mana perkara yang direkodkan dikendalikan olehnya atau mana-mana peguam cara sehingga fi yang belum dibayar atau terhutang padanya dibayar sepenuhnya. Pada 16 Mac 2012, responden menyerahkan invois-invois *pro forma* berjumlah RM4,911,553 kepada Patent View dan perayu-perayu. Pada 2 April 2012, perayu-perayu mempertikaikan kedua-dua prinsipal dan kuantum yang dikenakan dan membuat pertanyaan sama ada responden bersetuju dengan percukaian bil bawah s. 126(3) Akta Profesion Guaman 1976 ('APG'). Pada 22 September 2016, responden menyediakan bil kos terperinci untuk percukaian dan perkhidmatan atas perayu-perayu. Pada 21 November 2016, responden memfailkan saman pemula, yang kemudiannya dipinda, antara lain, untuk bayaran fi guaman dan perintah

A percukaian. Pada 19 Jun 2017, Mahkamah Tinggi membenarkan saman pemula dipinda. Pada 30 Mei 2018, Mahkamah Rayuan menolak rayuan perayu terhadap perintah Mahkamah Tinggi. Oleh itu, rayuan ini oleh perayu-perayu.

Diputuskan (membenarkan rayuan)

B **Oleh Abdul Rahman Sebli HMP menyampaikan penghakiman mahkamah:**

(1) Isu utama yang timbul adalah sama ada surat bertarikh 2 April 2012 terjumlah sebagai persetujuan oleh perayu. Surat bertarikh 2 April 2012, ditafsirkan dengan betul, tidak mengandungi persetujuan kerana perayu-perayu hanya membuat pertanyaan sama ada responden terbuka untuk bil dikenakan cukai iaitu sama ada pihak yang lain bersetuju dengan percukaian bawah s. 126(3) AGP. Persoalan persetujuan tidak timbul. Responden tidak memberi jawapan. Dia hanya memfailkan saman pemula lima tahun kemudian.

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D

(2) Responden tidak memenuhi keperluan penyerahan bil kos dan, oleh itu, tidak berhak menuntut perintah percukaian. Atas dasar itu sahaja saman pemula yang dipinda sepatutnya ditolak. Invois-invois *pro forma* bukan bil kos dalam maksud s. 126(1) AGP. Tiada bil kos diserahkan kepada perayu-perayu. Responden tidak memberikan apa-apa alasan untuk kegagalannya berbuat demikian. Oleh kerana lebih enam tahun sudah berlalu sejak selesainya kerja-kerja, responden tidak lagi mempunyai hak mengambil mana-mana langkah tersebut.

E

(3) Jika responden dikatakan telah menyerahkan bil kos dalam maksud s. 126(1) AGP, dia tidak mempunyai hak menuntut perintah percukaian selepas setahun dari tarikh penyerahan bil-bil. Bil-bil yang dimaksudkan diserahkan pada 16 Mac 2012 dan tempoh satu tahun telah luput pada 16 Mac 2013. Saman pemula telah difailkan pada 21 November 2016.

F

Case(s) referred to:

G *Abbas & Ngan lwn. Affin Bank Bhd [2010] 1 LNS 1082 HC* ***(refd)***
Bell v. Alfred Franks and Barlett Co Ltd [1980] 1 All ER 356 ***(refd)***
Coburn v. Colledge [1897] 1 QB 702 ***(refd)***
Dobbs v. Brayson (No. 2) (2007) 38 Fam LR 95 ***(refd)***
Harman & Co Solicitor Nominee Company v. Secureland Mortgage Investments Nominees Ltd [1992] 2 NZLR 416 ***(refd)***

H *Ng Kim Hoong & Anor v. Pentadbir Tanah Wilayah Persekutuan [2019] 10 CLJ 110 HC* ***(refd)***
Shamsudin Embun v. P T Seah & Co [1985-1986] ALR (R) 1108 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 116, 121(1)(b), (c), 124(1), 126(1), (3), 128(2), 132
I Limitation Act 1953, s. 6(1)(a)

Landlord and Tenant Act 1954 [UK], s. 23(4)

For the appellants - Malik Imtiaz Sarwar, Sonia Deva Doss & Khoo Suk Chyi; M/s Culaz & Assocs

For the respondent - Gopal Sri Ram, Harpal Singh Grewal, Archana Nair, Pang Wilson, Marcus Lee, Shailender Bhar; M/s AJ Arrifin Yeo & Harpal

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli FCJ:

[1] The respondent obtained a High Court order, *inter alia*, for the bill of costs between him and the appellants to be taxed on a "solicitor and client" basis. The appellants appealed against the order but was dismissed by the Court of Appeal, hence the present appeal before us.

[2] The facts can best be laid down by setting out the chronology of events leading to the present appeal. They are as follows:

(i) In 2005, the respondent was appointed by Patent View Development Sdn Bhd ("Patent View") and the appellants in their personal capacities to act for them in various legal proceedings.

(ii) On 22 March 2011, the appellants terminated the services of the respondent.

(iii) On 4 April 2011, the appellants' solicitors, Messrs Culaz & Associates ("Messrs Culaz") informed the respondent that they had instructions to represent Patent View and the appellants. Messrs Culaz requested, *inter alia*, for a list of pending matters, final account of fees paid and the balance payable.

(iv) On 5 April 2011, the respondent stated his objection to any matter that was on record being handled by him or any other solicitor until the fees due and owed to him were settled in full.

(v) On 16 March 2012, the respondent delivered *pro forma* invoices amounting to RM4,911,553 to Patent View and the appellants.

(vi) On 2 April 2012, the appellants through Messrs Culaz disputed both the principal and quantum charged and inquired whether the respondent consented to the taxation of the bills under s. 126(3) of the Legal Profession Act 1976 ("the LPA").

(vii) On 22 September 2016, the respondent prepared a detailed bill of costs for taxation and effected service on the appellants.

(viii) On 21 November 2016, the respondent filed an originating summons, which was later amended, *inter alia*, for payment of the legal fees and order for taxation.

(ix) On 19 June 2017, the High Court allowed the amended originating summons.

(x) On 30 May 2018, the Court of Appeal dismissed the appellants' appeal against the High Court order.

(xi) On 22 April 2019 this court granted the appellants leave to appeal against the Court of Appeal's decision on the following questions of law:

Question 1

Whether the phrase "a bill of costs delivered by an advocate and solicitor" in s. 126(1) of the LPA is to be interpreted as referring to a bill of costs that contain detailed items within the meaning of s. 121(1) of the LPA and is thereby ready for taxation?

Question 2

Whether the High Court can grant an order for the taxation of a solicitor's bill of costs under s. 126(1) of the LPA after the expiry of the one year from the delivery of the bill of costs in the light of s. 128(2) of the LPA?

Question 3

Whether the phrase "consent to taxation of a solicitor's bill" in s. 126(3) of the LPA is to be interpreted as requiring an agreement between the client and the solicitor that the solicitor's bill be taxed?

Question 4

Whether the High Court has jurisdiction to grant an order for taxation under s. 126(3) of the LPA if the parties have consented to the taxation of bill of costs?

Question 5

Whether the limitation period of six years under s. 6(1)(a) of the Limitation Act 1953 ("the LA") applies to any action by an advocate and solicitor to recover costs due for any business done by him under the LPA?

Question 6

If yes, whether the limitation period of six years starts from the date the business by the advocate and solicitor is completed?

[3] Having heard arguments by both sides, both written and oral, we unanimously allowed the appellants' appeal on the following broad grounds. The central issue in this appeal was whether or not the letter dated 2 April 2012 amounted to a consent by the appellants as found by both courts below.

We found the findings to be unsupported by the evidence as the letter properly construed does not constitute consent as it merely asked whether the other party consented to taxation pursuant to s. 126(3) of the LPA. Question 3 therefore assumes a fact that is not borne out by the evidence.

[4] The fact that the respondent filed an originating summons dated 3 March 2012 for taxation reinforced our view that this was not a case under s. 126(3) of the LPA. Given our finding on question 3, we found it unnecessary to answer the rest of the questions posed.

[5] Even if we were to answer all the leave questions instead of just dealing with question 3, we would still be inclined to agree with the submissions of the appellants, in preference to the 37-page written submissions of the respondent dated 15 August 2019. In this regard, we can do no better than to adopt as our own the submissions of learned counsel for the appellants on all those issues, as follows.

[6] The LPA provides for a specific framework regulating the legal profession. The then Deputy Minister of Law had the following to say when tabling the Bill for the LPA on 18 December 1975:

> The central purpose of this Bill, therefore, Sir, is to foster and sustain the high standard of the legal profession and to regulate the conduct of its ever increasing members
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> ...
>
> On the whole, Sir, the Legal Profession Bill has been carefully and comprehensively drafted to ensure a high ethical standard in legal practice and to provide adequate protection to the clients.

[7] The remuneration of an advocate and solicitor is an aspect of the legal profession that is wholly governed by Part VIII and Part IX of the LPA:

> Contentious business
>
> (i) Fee agreement
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> By virtue of s. 116 of the LPA, an advocate and solicitor is entitled to remuneration for services rendered. In respect of contentious business, an advocate and solicitor may enter into a written fee agreement with a client. Such an agreement may provide for the amount and manner of payment.
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> (ii) Absence of fee agreement
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> Where a written fee agreement has not been entered into, then an advocate and solicitor may recover his costs through the issuance of either a gross sum or detailed bills of costs as stipulated by s. 121 of the LPA.

It is imperative for a bill of costs to be so delivered to entitle an advocate and solicitor to sue for the same: Section 124(1) of the LPA.

Gross Sum Bill Of Costs

If gross sum bill of costs is delivered on a party chargeable:

(a) The said party chargeable may within three months of delivery of the said gross sum bill of costs require the advocate and solicitor to deliver a detailed bill;

(b) If an advocate and solicitor sues on a gross sum bill, the court shall, if so requested by the party chargeable within one month from the service on that party of the writ or other originating process, order that the bill shall be taxed: Section 121(1)(b) of the LPA. Such taxation is to be conducted in accordance with the Rules of Court 2012: Section 121(1)(c) of the LPA.

Detailed Bill Of Costs

In relation to a detailed bill of costs, a party chargeable can petition to obtain an order that the said bill of costs be taxed within six months from the date of delivery of the said bill of costs. The advocate and solicitor can do the same in the period after one month to one year from delivery of the bill of costs: Section 126(1) of the LPA.

[8] The term used in s. 126(1) of the LPA is "bill of costs". *Ex facie*, no distinction is made between a gross sum bill and a detailed bill. However, a close reading of the provision would show that it is the bill of costs that is delivered on the party chargeable that is to be taxed. The provision reads:

> An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six month from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.

[9] This is reinforced by s. 132 of the LPA which reads:

> Bills of costs for taxation as between advocate and solicitor and client shall be drawn in the manner provided by the Rules of the High Court, and the taxation shall be governed by the Rules.

[10] "Consent" within the meaning of s. 126(3) of the LPA must be taken to mean "to give assent or permission to do something; agree": *Anastase* [2001] Lexis citation 4671 citing *Collins Concise English Dictionary*. In *Bell v. Alfred Franks and Barlett Co Ltd* [1980] 1 All ER 356, the English Court of Appeal extensively discussed the meaning of "consent" in s. 23(4) of the English Landlord and Tenant Act 1954. It was held that "consent" required some positive action of an affirmative kind, and that it "must be something more than merely standing by and not objecting."

[11] In *Harman & Co Solicitor Nominee Company v. Secureland Mortgage Investments Nominees Ltd* [1992] 2 NZLR 416, the New Zealand Court of Appeal had to deal with the definition of "consent" in the Land Transfer Act 1952. The court found that "consent" requires "a positive affirmative act such as written or oral acceptance or even an implied acceptance by conduct."

[12] In *Dobbs v. Brayson (No. 2)* (2007) 38 Fam LR 95, the Family Court of Australia had to determine if the mother consented to the adoption of a certain procedure in the proceedings. The court in analysing the definition of "consent" in various contexts found that context for the purposes of equity means a "voluntary agreement or yielding of the will: an accord of mind".

[13] The following emerged from the foregoing:

(i) Whatever the case, the taxation of a bill of costs must be preceded by the delivery of a bill of costs, be it gross or detailed;

(ii) An order of taxation of a bill of costs is not required where both the advocate and solicitor and the client consent to the bill of costs being taxed:

  (a) such consent must be mutual and involve a positive demonstrative act;

  (b) there "must be something more than merely standing by and not objecting."

(iii) Where a gross sum bill of costs is delivered, a taxation without the delivery of a detailed bill is only permitted under s. 121(1)(b) of the LPA. In all other cases, where an order for taxation is applied for, then it must be applied for on the basis of a detailed bill of costs that fulfills the requirements of s. 132 of the LPA, such bill of costs having been delivered on the party chargeable.

[14] An advocate and solicitor who seeks an order of taxation for a detailed bill of costs must do so within one year from the delivery of such a bill. The High Court does not have the inherent jurisdiction to order otherwise given the clear legislative intention underlying s. 126(1) and s. 128(2) of the LPA.

[15] Non-payment of costs within the scheme of the provisions identified above cannot in law amount to a breach of contract. The requirement for taxation is a procedural safeguard pertaining to the quantum of the amount of costs sought to be recovered by the advocate and solicitor. This is in aid of the recovery of costs owed to the advocate and solicitor contractually. The one-year bar on advocates and solicitors under ss. 126(1) and 128(2) of the LPA only applies to a taxation of bills of costs. This safeguard is triggered at the instance of the party chargeable when he disputes the bill of costs.

[16] Where an advocate and solicitor delivers a bill of costs, and that bill of costs is not disputed, then the advocate and solicitor is not required to procure an order for taxation. He is free to sue on that bill of costs. In such instance, he has a period of six years to do so from the date the contentious business was completed under s. 6(1) of the LA.

[17] In this regard, the English Court of Appeal decision in *Coburn v. Colledge* [1897] 1 QB 702, which was cited with approval in *Abbas & Ngan lwn. Affin Bank Bhd* [2010] 1 LNS 1082 is instructive. It was held in that case that the enactment of the Solicitors Act 1843 merely provided for a specific procedure to enforce a solicitor's right to his payment. The 1843 Act only provided a remedy to enforce that right. Lord Esher MR said at pp. 706-707:

> The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think s. 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges, or disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements until then. It assumes that he has a right to be paid the fees, charges, and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied. If the solicitor has any other mode of enforcing his right than by action, the section does not seem to interfere with it.
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> ...
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> Therefore, as soon as the solicitor had done the work, he could have maintained his cause of action for work and labour. The defendant might plead that no bill of costs had been delivered, but that would only be by way of answer to a case which constituted a good cause of action. For these reasons I think that the cause of action in this case, to use the language of the statute of Anne, was "given, accrued, fallen or come" the moment that the work which the plaintiff was retained to do was completed.

[18] Lopes LJ pointed out the inconvenience that could be caused if solicitors were allowed to abstain from delivering their bills for a considerable period of time without any regard to the limitation period. He said at p. 709:

> That may be so; but on the other hand, if the plaintiff's contention is correct, the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver it and sue after the expiration of a month from its delivery. It seems to me that that would be a very anomalous and inconvenient result.

[19] Chitty LJ took into consideration the objects of the Limitation Act, which is to protect against stale demands. He also observed that the Solicitors Act 1843 does not affect the cause of action but only seeks to postpone the right of action until after one month from the date of delivery of the bill of costs. He said at pp. 709-710:

> The object of the Statute of Limitations (21 Jac. 1, c. 16) was to afford a certain amount of protection against stale demands. I say to afford a certain amount of protection, because the statute does not bar the debt, but only takes away the remedy by action. The statute therefore makes a distinction between the cause of action. There does not appear to me to be any substantial difference for the present purpose between the language of the statute of James I and that of the statute of Anne. The question in this case is when the cause of action arose. It was said that on the one side that it only arose a month after the signed bill was delivered. That argument was based upon s. 37 of 6 & Vict. C. 73. That enactment, like the Statute of Limitations, appears to me only to establish a limitation with regard to the remedy; it in no way affects the cause of action, which is money payable for work done, but only postpones the right of action upon it for at least one month from the delivery of the bill.

[20] This would mean that an advocate and solicitor must deliver a bill of costs upon the party chargeable within six years. Where an advocate and solicitor sues in such circumstances, he bears the burden of proving the reasonableness of the amount claimed: *Shamsudin Embun v. P T Seah* & Co [1985-1986] ALR (R) 1108 per Chan Sek Keong JC (as he then was) and *Ng Kim Hoong & Anor v. Pentadbir Tanah Wilayah Persekutuan* [2019] 10 CLJ 110.

[21] Applying the legal principles to the facts, we agree with the appellants that the answers to the leave questions should be as follows:

(i) Whether the phrase "a bill of costs delivered by any advocate and solicitor" in s. 126(1) of the LPA is to be interpreted as referring to a bill of costs that contains detailed items within the meaning of s. 121(1) of the LPA and is thereby ready for taxation?

Answer: Yes.

(ii) Whether the High Court can grant an order for the taxation of a solicitor's bill under s. 126(1) of the LPA after the expiry of one year from the delivery of the bill of costs in the light of s. 128(2) of the LPA?

Answer: Yes.

(iii) Whether the phrase "consent to taxation of a solicitor's bill" in s. 126(3) of the LPA is to be interpreted as requiring an agreement between the client and the solicitor that the solicitor's bill be taxed?

Answer: Yes.

(iv) Whether the High Court has the jurisdiction to grant an order for taxation under s. 126(3) of the LPA if the parties have consented to the taxation of the bill of costs?

Answer: No.

(v) Whether the limitation period of six years under s. 6(1) of the LA applies to any action by an advocate and solicitor to recover costs due for any business done by him under the LPA?

Answer: Yes.

If the answer is yes, whether the limitation period of six years starts from the date the business done by an advocate and solicitor is completed?

Answer: Yes.

[22] It is clear to us that the respondent had not fulfilled the requirement of delivering a bill of costs and as such was not entitled to seek an order of taxation. On that basis alone, the amended originating summons ought to have been dismissed. The *pro forma* invoices were not bills of costs within the meaning of s. 126(1) of the LPA. No bills of costs were ever delivered to the appellants. The respondent did not provide any reason for his failure to do so. Given that more than six years had lapsed since the completion of work, the respondent would no longer be entitled to take any of the foregoing steps.

[23] Even if the respondent can be taken to have delivered bills of costs within the meaning of s. 126(1) of the LPA, he was not entitled to seek an order of taxation after one year from the date of delivery of the bills. The purported bills were delivered on 16 March 2012 and the 1 year period lapsed on 16 March 2013. The originating summons was filed on 21 November 2016.

[24] The question of consent did not arise. The appellants had merely enquired whether the respondent was open to having the bills taxed. The respondent did not reply. He only filed the originating summons five years later.

[25] It was for all the reasons as submitted by the appellants that we unanimously allowed the appeal with costs of RM50,000 including costs for the leave application, subject to payment of the allocator fee. We also made an order that a sum of RM5,026,607.60 be paid to the appellants within 14 days from the date of decision.